**Mailed 4/9/2003**

Decision 03-04-034 April 3, 2003

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| Application of Southern California Edison Company (U 338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs. | Application 00-11-038 (Filed November 16, 2000) |
| Emergency Application of Pacific Gas and Electric Company (U 39 E) to Adopt a Rate Stabilization Plan. | Application 00-11-056 (Filed November 22, 2000) |
| Petition of The Utility Reform Network for Modification of Resolution E-3527. | Application 00-10-028 (Filed October 17, 2000) |

# ORDER MODIFYING DECISION 02-06-070 AND DENYING REHEARING OF DECISION AS MODIFIED

This rehearing application concerns Commission Decision (D.) 02-06-070, as modified by D.02-07-007 (hereinafter D.02-06-070). In D.02-06-070, we awarded The Utility Reform Network (TURN) $573,335.70 in compensation for its substantial contribution to D.01-01-018, D.01-03-029, D.01-03-082 and D.01-05-064. Of that amount, $256,390.97 was for outside counsel fees TURN incurred for its participation, through July 16, 2001, in the following federal court proceedings Southern California Edison Company (Edison) and Pacific Gas and Electric Company (PG&E) filed against the Commission: *Edison v. Lynch et al.*, Case No. 00-12056-RSWL (Mcx) United Stated District Court (USDC) for the Central District of California (Western Division) and *PG&E v. Lynch, et al.*, Case No. CV 00-4128 (SBA) USDC for the Northern District of California (respectively filed on November 8 and 13, 2000).

In D.02-06-070, we concluded that TURN was eligible to receive compensation for its federal district court work pursuant to Public Utilities Code (P.U. Code) Section 1801 et seq. because TURN had fulfilled the prerequisite requirements of Section 1803.[1] That section provides:

> "The commission shall award reasonable advocate's…expert witness…and other…costs of preparation for and participation in a hearing or proceeding to any customer who complies with Section 1804 and satisfies both of the following requirements:
>
> (a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.
>
> (b) Participation or intervention without an award of fees or costs imposes a significant financial hardship."

In addition, Section 1802(a) defines the compensation to be paid to an intervenor who is found to have made a substantial contribution to include "the fees and costs . . . of obtaining judicial review."

We concluded that TURN had fulfilled the requirements of Section 1803 because we construed the word "hearing" in that section as meaning a hearing before entities other than the Commission. We also found that our interpretation of Section 1803 harmonizes with Section 1802(a), which specifically authorizes compensation for costs associated with judicial review.

Edison and PG&E filed applications for rehearing of D.02-06-070, challenging only the portion of the decision awarding compensation for TURN's federal litigation work and arguing, among other matters, that our construction of Section 1803 was inappropriate. TURN filed a response to the utilities' applications for rehearing, maintaining, among other matters, that we appropriately construed Section 1803 and that it should be compensated for its federal district court work.

In response to the applications for rehearing, we have reviewed the legal basis for the challenged portion of our decision. We conclude that our award

[1] Unless otherwise stated, all code sections refer to the P.U. Code.

of compensation for TURN's federal district court work was appropriate, in accordance with the legislature's specific authorization to compensate intervenors for the "fees and costs . . . of obtaining judicial review." (Section 1802(a)). We find that this specific statutory authorization is sufficient to support the challenged portion of our award of compensation to TURN. We modify the reasoning of D.02-06-070 to clarify that the award of compensation for federal district court work is based on the judicial review language in Section 1802(a). We do not reach the more general issue of when we may compensate work unrelated to judicial review performed before other entities, as it is unnecessary to do so in order to resolve this compensation request.

The plain language of the intervenor compensation statute, Public Utilities Code Sections 1801–1812, permits the Commission to compensate intervenors for costs and fees associated with judicial review. As previously noted, Section 1803 states that the Commission shall award fees and costs to intervenors who have made a substantial contribution to a Commission decision or order and for whom participation without an award of fees or costs would impose a significant financial hardship. Section 1804(e) states that, if the Commission finds that the intervenor has made a substantial contribution, the Commission shall prepare an order that describes the substantial contribution and determines "the amount of compensation to be paid . . .." Section 1802(a) defines compensation as:

> . . . payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a proceeding *and includes the fees and costs* of obtaining an award under this article and *of obtaining judicial review*, if any. (Emphasis added).

Thus, the legislature has expressly authorized the commission to compensate intervenors for fees and costs associated with obtaining judicial review.

Section 1802(h) defines "substantial contribution" to mean that:

> in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.

Thus, costs of obtaining judicial review are compensable if they are among the "reasonable costs incurred by the customer in preparing or presenting" the contentions or recommendations that constitute the intervenor's substantial contribution.

D.02-06-070 finds that TURN's participation in the federal court forum was helpful in protecting the Commission's authority to act as it eventually did in D.01-03-082. (p. 17). The decision further finds that "TURN could not practically or effectively advocate its position before the Commission without first helping to overcome utility litigation intended to prevent the Commission from acting on the very points TURN was seeking to raise at the Commission." (Id.)

The costs of TURN's federal court work were, therefore, part of the reasonable costs that TURN incurred in order to make its substantial contributions in these consolidated dockets. Accordingly, TURN's expenses for participation in the federal court are eligible for compensation.

Edison and PG&E argue that TURN's federal court participation must satisfy the definition of substantial contribution in Section 1802(h). They contend that this definition has not been met because the Commission did not expressly adopt any contention or recommendation TURN made in federal court.

However, we disagree with the utilities' contention that judicial review activities are only compensable if the Commission adopts intervenor arguments made in the course of judicial review in a subsequent Commission decision. If an intervenor successfully defends a Commission's decision against judicial review, it is unreasonable to expect the Commission to issue another Commission decision noting that its previous decision was upheld and crediting the intervenor's arguments before the reviewing court. In authorizing compensation for judicial review, the legislature did not require this impractical and unlikely result, but rather that the work before the reviewing court be related to or necessary for the substantial contribution made in the Commission decision for which compensation is sought. In concluding that TURN's federal court work was helpful in preserving the Commission's authority to make the decisions for which TURN seeks compensation, we made such a finding in D.02-06-070. The utilities fail to show that we erred in making that factual determination.

Edison contends that the judicial review for which compensation is authorized is limited to judicial review of Commission decisions in state courts. However, as this docket shows, there can be no dispute that parties can use the federal court forum to seek judicial review of Commission decisions. The statute draws no distinction between judicial review in state courts and federal courts, instead simply authorizing compensation for judicial review generally. The legislature has expressly directed that the intervenor compensation provisions be "administered in a manner that encourages the effective and efficient participation" of intervenors. (Section 1801.3(b)). Whether in federal or state court, judicial review could be used to reverse a decision favorable to an intervenor. To encourage effective participation of intervenors in our proceedings, it makes little sense to compensate them for the costs of defending a favorable decision when the challenging party chooses a state court forum, but to deny any compensation when the challenging party chooses a federal court forum. The effectiveness of intervenors would be seriously hamstrung if they could never

obtain compensation to oppose reversal of favorable decisions by a federal court.[2] Indeed, Edison's interpretation would encourage parties seeking to avoid any intervenor participation in judicial review to opt for the federal court forum. The statute gives no indication that it intended to put intervenors at a disadvantage with respect to judicial review in federal court.

For similar reasons, we do not interpret the phrase "obtaining judicial review" in Section 1802(a) to provide compensation only when an intervenor initiates judicial review. Once judicial review is initiated, all parties that participate in the process are seeking to "obtain" judicial review in their favor. Thus, an intervenor can obtain judicial review not just by succeeding when it initiates judicial review to challenge a Commission decision, but also when the intervenor successfully defends a Commission decision against a challenge. Again, this interpretation is buttressed by the legislative mandate to interpret the statutory provisions to encourage effective intervenor participation. (Section 1801.3(b)). If an intervenor cannot gain compensation to defend a Commission decision in which the intervenor prevailed, the intervenor's effectiveness is severely limited.

Accordingly, D.02-06-070 correctly found that the fees and costs incurred by TURN in federal court were fees and costs incurred in obtaining judicial review and that TURN's federal court work significantly assisted TURN in making its substantial contribution to the various Commission decisions. In light of Section 1802(a)'s express authorization of compensation for the fees and costs of obtaining judicial review, these findings are sufficient to support the award of compensation for TURN's federal court work. The reliance of D.02-06-070 on Section 1803, and in particular, an interpretation of the words "hearing and proceeding," is unnecessary in order to find that TURN's federal

[2] Conversely, if an intervenor seeks to reverse a Commission decision the intervenor finds unfavorable, Edison's interpretation would undermine the effectiveness of the intervenor by effectively foreclosing an option, judicial review in federal court, that the intervenor might otherwise find attractive.

court work may be compensated. Accordingly, we modify D.02-06-070 to remove the portions which interpret Section 1803, including the discussion of three standards that must be met to compensate intervenors for work outside of the Commission forum.

For the first time on rehearing, Edison contends that the Commission could not compensate TURN for its federal court work because TURN's notice of intent to claim compensation (NOI) failed to note that TURN would be requesting compensation for its federal court work. Edison states that TURN had already incurred substantial costs in federal court when it filed its NOI. Edison relies on Section 1804(a)(2)(A), which states that the intervenor shall include in the NOI a "statement of the nature and extent of the customer's planned participation in the proceeding as far as it is possible to set it out when the notice of intent is filed" and "an itemized estimate of the compensation that the customer expects to request, given the likely duration of the proceeding as it appears at the time."

While not good practice, TURN's failure to indicate its intent to seek compensation for federal court work is not fatal to its request. Edison does not cite the following language from Section 1804(b)(2): " . . . the failure of a customer to identify a specific issue in the notice of intent or to precisely estimate potential compensation shall not preclude an award of reasonable compensation if a substantial contribution is made." By this provision, the legislature has made clear that it did not intend to require the commission to deny compensation based on NOIs that later prove to have underestimated the requested compensation amount or that are incomplete. A full reading of Section 1804, subsections (a) and (b), shows that the content of the NOI is intended to provide a non-binding preview to the parties and the administrative law judge (ALJ) of the intervenor's planned participation. Based on the NOI, the ALJ may (but is not required to) issue a non-binding ruling identifying for the benefit of the intervenor matters that may affect the intervenor's "ultimate claim for compensation," including "areas of potential duplication in showings" and an "unrealistic expectation for

compensation." (Section 1804(b)(2)). Nothing in Section 1804 suggests that the legislature intended omissions in NOIs to serve as an absolute bar to obtaining compensation for omitted items.[3] Nevertheless, we advise TURN that better practice is to include in the NOI significant expenditures of resources for which it may seek compensation, if for no other reason than to permit the ALJ to identify potential problems or risks associated with a future claim for compensation.

## CONCLUSION

We grant rehearing to clarify that we no longer rely on the interpretation of Section 1803 set forth in D.02-06-070, including the discussion of standards for approving compensation for work before entities other than the Commission. We find that the approval of compensation for TURN's work in federal court is appropriate in light of the explicit authorization of compensation for the fees and costs of obtaining judicial review in Section 1802(a). The utilities' applications for rehearing have failed to demonstrate any factual or legal error in D.02-06-070, as modified.

**THEREFORE, IT IS ORDERED** that:

1. Rehearing of D.02-06-070 is granted to modify the decision as follows:
    a. The third full paragraph on page 10 is deleted.
    b. The following text is added to the end of the second full paragraph on page 11:

"In its reply comments, TURN stated that the statute clearly provides for an award of costs for work during judicial review of Commission decisions, and does not distinguish between judicial review in the state courts and judicial review in the federal courts. TURN also stated that SCE's arguments to the federal court sought to prevent the Commission from enforcing its earlier decisions against SCE, such that the federal lawsuits amounted to judicial review of the earlier decisions."

[3] Edison does not cite any decision in which we denied compensation to which an intervenor was otherwise entitled because of an incomplete NOI. Nor are we aware of any such decisions.

c. The text beginning with the third full paragraph on page 11 through the first full paragraph on page 13 is deleted and replaced with the following text:

"The plain language of the intervenor compensation statute, Public Utilities Code Sections 1801–1812, permits the Commission to compensate intervenors for costs and fees associated with judicial review. Section 1803 provides:

> "The commission shall award reasonable advocate's…expert witness…and other…costs of preparation for and participation in a hearing or proceeding to any customer who complies with Section 1804 and satisfies both of the following requirements:
> (a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.
> (b) Participation or intervention without an award of fees or costs imposes a significant financial hardship."

Thus, pursuant to Section 1803, the Commission shall award fees and costs to intervenors who have made a substantial contribution to a Commission decision or order and for whom participation without an award of fees or costs would impose a significant financial hardship. Section 1804(e) states that, if the Commission finds that the intervenor has made a substantial contribution, the Commission shall prepare an order that describes the substantial contribution and determines "the amount of compensation to be paid . . .." Section 1802(a) defines compensation as:

> . . . payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a proceeding *and includes the fees and costs* of

> obtaining an award under this article and *of obtaining judicial review*, if any. (Emphasis added).

We agree with TURN that the legislature has expressly authorized the commission to compensate intervenors for fees and costs associated with obtaining judicial review. We also agree with TURN that SCE's lawsuit sought to challenge earlier Commission decisions—D.99-10-057 and D.00-03-058, the post transition ratemaking decisions—and thus amounted to judicial review of the earlier decisions. Also, as SCE's lawsuit illustrates, in addition to the state courts, the federal courts may also review the Commission's actions. Furthermore, judicial review of our "findings" occasionally is sought, as SCE did here, during a proceeding rather than after a final order."

d. The text beginning with the second full paragraph on page 13 is deleted through page 17 and replaced with the following.

"As quoted above, § 1803 requires that the customer's presentation make a "substantial contribution to adoption, in whole or in part, to the commission's order or decision." Section 1802(h) defines "substantial contribution" to mean that:

> in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation."

Thus, costs of obtaining judicial review are compensable if they are among the "reasonable costs incurred by the customer in preparing or presenting" the contentions or recommendations that constitute the intervenor's substantial contribution."

Here, the utilities sought to use the federal court to undermine this Commission's authority over retail ratemaking. As TURN noted in its request for compensation, these issues represent literally billions of dollars for the utilities' customers and arise under the well-known financial and power supply emergency conditions that resulted from deregulation.

We find that TURN's participation in the federal court forum was helpful in protecting the Commission's authority to act as it eventually did in D.01-03-082. In this way, TURN's federal court actions significantly contributed to TURN's ability to make its substantial contribution to "the eventual decision in this matter." The federal court litigation was an essential component of these consolidated proceedings and the Commission decisions that are the subject of TURN's compensation request. As such, TURN could not practically or effectively advocate its position before the Commission without first helping to overcome utility litigation intended to prevent the Commission from acting on the very points TURN was seeking to raise at the Commission.

The costs of TURN's federal court work were, therefore, part of the reasonable costs that TURN incurred in order to make its substantial contributions in these consolidated dockets. Accordingly, we will recognize TURN's expenses for participation in the federal court as part of its intervenor compensation claim."

e. Add the following as Finding of Fact 3.:

"TURN's federal district court work was related to judicial review of findings in previous Commission decisions."

f. Add the following as Finding of Fact 4:

"TURN's efforts in federal court were helpful in protecting our authority to act as we eventually did in D.01-03-082."

2. Rehearing of D.02-06-070, as modified, is denied.

This order is effective today.

Dated April 3, 2003 at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners